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No. 94-8769

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

TOMMY L. RUTLEDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

Jerold S. Solovy
Counsel of Record

Barry Levenstam
Jacob I. Corré
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
312-222-9350
Counsel for Petitioner

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The government agrees that the single question raised in this Petition has divided the courts of appeals, and recognizes that "[b]ecause the conflict in the circuits gives no sign of abating . . . the issue may warrant review by this Court in an appropriate case." Brief for the United States in Opposition, Wingo v. United States, cert. pending, No. 94-7980 at 7, 13, adopted in, Brief for the United States in Opposition, Rutledge v. United States, cert. pending, No. 94-8769. Nevertheless, the government maintains that review by this Court is unwarranted in this case because Mr. Rutledge would remain under a life sentence even if this Court were to find a Double Jeopardy Clause violation based on the entry of judgment and imposition of concurrent sentences on both CCE and conspiracy verdicts. (U.S. Br. 3-4.) For two independent reasons, that is not a good reason

to leave a critical and frequently litigated issue in federal criminal law unresolved by declining to review the decision below.

First, the Double Jeopardy Clause plainly applies even to cases where it is not likely to affect the amount of time the defendant will spend in jail. In Ball v. United States, 470 U.S. 856, 865 (1985), this Court held that a second judgment of conviction can violate the Double Jeopardy Clause "even if it results in no greater sentence" and that the judgment itself may qualify as "an impermissible punishment." Neither reason nor authority supports the government's implicit suggestion that the prohibition against multiple punishments for the same offense arises only when they are likely to have a material effect on the defendant's subsequent status as a recidivist, or when one of the convictions is likely to be overturned in the future. (U.S. Br. 3-4.) The Double Jeopardy Clause provides categorical protection against multiple punishments for the same offense, not merely "practical" guarantees concerning the ultimate span of incarceration. This case affords the Court with an excellent opportunity to reaffirm the basic principles of the Double Jeopardy Clause while also resolving an entrenched conflict in the circuits over the application of those principles to a particular set of commonly prosecuted federal crimes.

Second, the government is not justified in speculating that Mr. Rutledge's other convictions and

sentences are invulnerable simply because he has not raised issues concerning them in his Petition. The most basic rules of direct appellate review limit Mr. Rutledge to raising questions in the Petition that properly were preserved in the lower courts. To the extent that Petitioner's previous lawyers rendered ineffective assistance of counsel in the trial court and in the court of appeals by failing to raise in a timely fashion meritorious points as to his trial, convictions and sentences, Mr. Rutledge can properly raise those points in a collateral attack.^{1/} The government has no basis at this time for claiming that Mr. Rutledge's other convictions are "very unlikely" to be overturned. (U.S. Br. 3-4.)

In sum, this is a perfectly appropriate case to resolve the ongoing dispute about the proper application of the Double Jeopardy Clause in the context of combined CCE and conspiracy prosecutions. When this Court denied the petition for a writ of certiorari in United States v. Fernandez, 500 U.S. 948 (1991), three justices dissented, noting that the question now squarely presented in Mr. Rutledge's Petition had caused significant confusion in the circuits. The intervening years have witnessed the compounding of that confusion. The time has come for this Court to settle this important and persistent issue once and for all.

^{1/} As was noted in Mr. Rutledge's Motion for Leave to Proceed In Forma Pauperis Without Affidavit of Indigency Executed By Petitioner, the Seventh Circuit first appointed his current counsel, for the purpose of filing this petition, after it had already affirmed the district court's judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerold S. Solovy
Counsel of Record

Barry Levenstam
Jacob I. Corré
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
312-222-9350
Counsel for Petitioner

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